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Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-567

WEST PENN POWER COMPANY,
a corporation,
Petitioner,

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, West Penn Power Company (hereinafter "West Penn"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on July 30, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, appears in Appendix I hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 30, 1976. (Appendix I) A timely petition for rehearing *en banc* was denied on September 15, 1976. (Appendix J) On September 29, 1976, the United States Court of Appeals for the Third Circuit stayed the issuance of the certified judgment in lieu of formal mandate until October 22, 1976, and also determined that, "[n]o further stay will be granted, without prejudice to the right of [West Penn] to apply to the Supreme Court of the United States for a stay since the denial of the Petition for Rehearing has determined the Petition for Review." (Appendix K) On October 12, 1976, West Penn filed in this Honorable Court at Docket No. A 293 an Application to Mr. Justice Brennan for Stay of Enforcement Pending Disposition of Petition for Writ of Certiorari, which Application was denied on or about October 20, 1976. This Honorable Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit's dismissal of West Penn's Petition for Review and refusal to stay threatened enforcement by Respondent of the Pennsylvania implementation plan, constitutes a violation of the Fifth and Fourteenth Amendments of the United States Constitution, by effectively foreclosing West Penn's opportunity for a meaningful hearing upon the issues raised in the Petition for Review, which due process issue was not passed upon by this Honorable Court in *Union Electric Co. v. EPA*.

2. Whether the United States Court of Appeals for the Third Circuit's dismissal of West Penn's Petition for Review and refusal to stay threatened enforcement by Respondent of the Pennsylvania implementation plan is in conflict with express provisions of the federally-approved Pennsylvania implementation plan, the federal-state relationship created by the Clean Air Act Amendments of 1970, and the Tenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

A summary of the background of this case and related litigation will best illustrate the dilemma in which West Penn finds itself.

West Penn is a Pennsylvania corporation and public utility, having its principal place of business in Greensburg, Pennsylvania. West Penn provides electric utility service for approximately 470,000 customers in the southwestern and north central portions of the Commonwealth of Pennsylvania. Among West Penn's facilities is Boiler No. 33 of the Mitchell Power Station (hereinafter "Mitchell"), a coal-fired boiler providing steam for turbo-generator No. 3 at Mitchell. Mitchell is situated on 31 acres of land in Union Township, Washington County, Pennsylvania. As of June 30, 1976, West Penn had an undepreciated investment of $35,900,000. at Mitchell, including $1.5 million for an electro-static precipitator which was installed on Boiler No. 33 during 1971.

West Penn respectfully submits that the history of the case at bar, when considered in light of related litigation that originated before the United States District Court for the Western District of Pennsylvania and the Pennsylvania Environmental Hearing Board (hereinafter "Board"),[1] demonstrates that the relief

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1. Effective January 19, 1971, the Board undertook to exercise the powers and perform the duties previously delegated to, *inter alia,* the Pennsylvania Department of Health and the Pennsylvania Air Pollution Commission. See, the Pennsylvania Administrative Code of 1929, 71 P.S. §510-1(16), (23); Pennsylvania Administrative Agency Law of 1945, 71 P.S. §1710.1. The Board is the quasi-judicial arm of the DER with the authority, *inter alia,* to hold hearings and issue adjudications, "on any order, permit, license or decision of the [DER]." 71 P.S. §510-21.

requested herein is urgently needed to afford West Penn its constitutional right to obtain a meaningful hearing on the merits of its case.

The origins of this case and the related litigation summarized below can be traced to the Respondent's approval on May 31, 1972, of the Pennsylvania implementation plan for the attainment of national ambient air quality standards. West Penn believes it is important to note at the outset that the United States Court of Appeals for the Third Circuit has concluded that no opportunity has been provided for individual sources to obtain a meaningful hearing regarding either the adoption of the sulfur oxide standard by the DER or the Respondent's approval of the Pennsylvania implementation plan.[2] Included in the approved implementation plan was a regulation[3] of the DER pertaining to the control of sulfur oxide emissions from power plants, including Mitchell.

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2. See *Duquesne Light Co. v. EPA I,* 481 F.2d 1, 8-9 (3d Cir. 1973), for a discussion of the Third Circuit's determination that companies similarly situated have not had an opportunity to obtain a meaningful hearing in connection with the DER's adoption of the sulfur oxide regulation.

3. Mitchell is located in Union Township, Pennsylvania. The sulfur oxide standard applicable to the Monongahela Valley Air Basin encompassing Union Township appears in 25 Pa. Code §123.22, which provides in part that:

> "[n]o person shall cause, suffer, or permit the emission into the outdoor atmosphere of sulfur oxides, expressed as SO_2, from any combustion unit, at any time, in excess of . . . 0.6 pounds per million B.t.u. of heat input when the heat input to the combustion unit in millions of B.t.u.'s per hour is equal to or greater than 2,000."

Because the sulfur oxide regulation was immediately applicable, the Pennsylvania implementation plan provided for variances from that standard. Significantly, the implementation plan also provided that the filing of a Petition for Variance operates as an automatic stay of prosecution for any alleged violation of the sulfur oxide emission limitation until final disposition of the application for variance.[4]

On September 15, 1972, pursuant to the Pennsylvania Air Pollution Control Act, 35 P.S. §4013.5, West Penn applied to the DER for a variance, as amended (Appendix A), for Boiler No. 33 at Mitchell from, *inter alia,* the sulfur oxide emission limitation contained in the Pennsylvania implementation plan.

On September 13, 1973, despite the pendency of the aforementioned Amended Petition for Variance which operated as an automatic stay of prosecution, the Respondent issued to West Penn a Notice of Violation of the Pennsylvania implementation plan, allegedly pursuant to Section 113(a)(1) of the Clean Air Act Amendments of 1970 (hereinafter "Clean Air Act"), 42 U.S.C. §1857c-8(a)(1). On February 18, 1975, the Respondent issued to West Penn a compliance order allegedly pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. §1857c-8(a)(1).

Six days after Respondent's issuance of the Notice of Violation, the DER granted to West Penn a conditional variance (see Exhibit to Appendix B) from the

4. See, 25 Pa. Code §141.5, reproduced in Appendix M at p. 133a. See also the Pennsylvania Bulletin of April 28, 1973, at page 808 extending the automatic stay of prosecution until final action by the DER on the pertinent variance application, which Notice is reproduced in Appendix M at p. 134a.

sulfur oxide emission standard of the Pennsylvania implementation plan until June 30, 1976. The conditional variance, however, ordered West Penn to install a sulfur emission control device on Boiler No. 33. Because West Penn believed and still believes that national ambient air quality standards can be attained and maintained without the installation of a sulfur control device at Boiler No. 33, and further believes that such a device is environmentally unsound and economically infeasible for installation on Boiler No. 33,[5] West Penn

5. The conditional variance issued by the DER would require the installation of a non-regenerative sulfur emission control device at Mitchell. Among the obstacles that would confront West Penn if it were to attempt to install such a sulfur emission control device are the following: (1) West Penn's inability to finance the installation of a sulfur emission control device now estimated to cost in the range of $50-90 million; (2) creation of 3.6 million tons of waste product over 25 years which cannot be disposed of in a safe or environmentally sound manner, or without violating the "no-dumping" ordinances of the township where Mitchell is located; (3) severe space limitations at the Mitchell site which could prevent installation of such a device, or at the very least, significantly increase the costs to West Penn and West Penn's customers; (4) creation of fumes by such a device which may be deleterious to the immediate area surrounding Mitchell; (5) numerous unsolved engineering problems. Even if, *arguendo,* an economically and technologically feasible sulfur emission control device could be installed, disposal of by-product wastes would create difficult, if not insuperable problems, resulting in a conflict with other environmental requirements of the Commonwealth of Pennsylvania, e.g., Pennsylvania Solid Waste Management Act, 35 P.S. §6001 *et seq.* West Penn could be required to obtain, *inter alia,* the following authorizations and commitments before it could begin installation of such a device—(a) state installation permit; (b) state indus-

appealed to the Board[6] certain of the conditions of the variance as well as the invalidity of the underlying regulations.

Thus, beginning in September, 1973, Respondent totally disregarded the stay of prosecution to which West Penn was entitled by the filing of its Amended Petition for Variance and subsequent appeal. Since then, West Penn has been faced with the threat of federal enforcement while at the same time attempting to obtain a variance, the terms of which would become part of the federally-approved Pennsylvania implementation plan.

a. District Court Action

On December 20, 1973, in the belief that the Respondent was without authority to issue the September, 1973 Notice of Violation, West Penn sought to insure the integrity and efficacy of the hearing to be held before the Board, or in the alternative, to obtain a hearing on its claim in a federal forum (either before the District Court or the Respondent), by filing a Complaint, as subsequently amended, in the United States District Court for the Western District of Pennsylvania (Appendix C) against the Respondent, the DER and the Secretary of the DER. The Amended Complaint

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trial waste permit; (c) federal water pollution control permit; (d) state solid waste management permit; (e) state sedimentation and erosion control permit; (f) state dams and encroachment permit; (g) state certificate of public necessity and convenience, if condemnation is necessary. These matters have been timely raised by West Penn before the Court of Appeals in the instant case and the Board.

6. West Penn's appeal was taken pursuant to the Pennsylvania Administrative Code of 1929, 71 P.S. §510-21. See, footnote 1, *supra* at p. 4.

sought injunctive relief to prevent the Respondent from enforcing the Notice of Violation issued in September, 1973, or, in the alternative, an order directing Respondent to hold an adjudicatory hearing on West Penn's claims.

On June 19, 1974, the District Court dismissed West Penn's Amended Complaint (Appendix E) for lack of subject matter jurisdiction in reliance on *Getty Oil Co. v. Ruckleshaus,* 467 F.2d 349 (3d Cir. 1972), *cert denied* 409 U.S. 1125 (1973). The Court stated that the issues raised by West Penn could have been raised in a Petition for Review filed with the United States Court of Appeals for the Third Circuit pursuant to Section 307 (b) (2) of the Clean Air Act, 42 U.S.C. §1857h-5(b) (2). The District Court subsequently denied West Penn's request for reconsideration (Appendix F).

On appeal to the United States Court of Appeals for the Third Circuit, West Penn limited its contentions to the District Court's refusal to enjoin enforcement of the Notice of Violation in light of the stay of enforcement to which West Penn was entitled under the Pennsylvania implementation plan. The dismissal of the Amended Complaint was affirmed at Docket No. 74-2050 by a divided three-judge panel of the Court of Appeals (Appendix G, including majority and dissenting Opinions). The majority held that, although the issues raised by West Penn had been improperly characterized by the District Court as falling within Section 307(b), nevertheless, jurisdiction did not lie in the District Court to determine whether the Respondent had properly issued the Notice of Violation because the Notice of Violation did not constitute "final agency action." On August 15, 1975, although three members

of the Court of Appeals voted to grant a rehearing, West Penn's Request for Rehearing *En Banc* was denied by a majority of the Court of Appeals (Appendix H).

On June 21, 1976, this Honorable Court denied West Penn's Petition for Writ of Certiorari filed at Docket No. 75-974 and, on October 4, 1976, also denied West Penn's Petition for Rehearing.

b. Petition For Review

On March 20, 1975, West Penn filed a Petition for Review (Appendix D) in the United States Court of Appeals for the Third Circuit at Docket No. 75-1259 in reliance upon the Third Circuit's decision in *Getty Oil Co. v. Ruckleshaus,* 467 F.2d 349 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973), which indicated that West Penn's contentions could be raised in the Court of Appeals in a Petition for Review, pursuant to Section 307(b)(2) of the Clean Air Act, 42 U.S.C. §1857h-5(b)(2).

On May 19, 1975, the United States Court of Appeals for the Third Circuit entered an Order staying enforcement of Respondent's previously issued compliance order until 30 days after disposition of West Penn's Petition for Review.[7]

On October 3, 1975, the United States Court of Appeals for the Third Circuit stayed disposition of West Penn's Petition for Review pending settlement negotiations between West Penn, Respondent and the DER. As a result of lengthy good faith negotiations, West

7. The September 29, 1976, Order of the Court of Appeals (Appendix K) states that the denial of West Penn's Petition for Rehearing *En Banc* on September 15, 1976, determined the Petition for Review.

Penn did reach a tentative agreement with the DER. Respondent rejected that agreement.

On June 25, 1976, this Honorable Court decided the case of *Union Electric Co. v. EPA,* 44 U.S.L.W. 5060 (U.S. June 25, 1976), holding that claims of economic and technological infeasibility cannot ordinarily be raised via a Petition for Review filed pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. §1857h-5(b). Instead, it was determined that such claims are to be raised before state administrative and judicial bodies, particularly those state agencies charged with granting variances from applicable air emission standards, which variances may then be designated as revisions to the pertinent state implementation plan.

As previously noted, on July 30, 1976, the United States Court of Appeals for the Third Circuit dismissed West Penn's Petition for Review (Appendix I), based upon *Union Electric Co. v. EPA, supra,* and despite its decision in *Duquesne Light Co. v. EPA,* 481 F.2d 1 (3d Cir. 1973). See discussion, *infra,* at p. 17. Prior to the dismissal of West Penn's Petition for Review, West Penn argued that if it were not granted a hearing it would be denied due process of law as a result of the District Court's dismissal of West Penn's Amended Complaint and West Penn's inability to obtain a meaningful hearing before the Board.[8] In response to this argument, the Court of Appeals recognized in its July 30, 1976, dismissal of the Petition for Review (Appendix I at p. 4)

8. On July 14, 1976, West Penn filed with the Third Circuit in the instant case a Motion for Oral Argument and Additional Comments on *Union Electric Co. v. EPA.* In that Motion, West Penn pointed out that in *Union Electric,* petitioner had failed to present its claims of denial of due process to the Eighth Circuit Court of

that West Penn could not obtain a meaningful hearing before the Board in view of the outstanding Notice of Violation and compliance order, but reasoned that West Penn could obtain a hearing or a stay of enforcement in the District Court by seeking review of the compliance order issued by the Respondent in February, 1975. However, on August 27, 1976, the Respondent issued an Order withdrawing the compliance order, thereby effectively depriving West Penn of prompt access to the District Court on its claims of economic and technological infeasibility.[9]

On August 13, 1976, the decision in *Union Electric Co. v. EPA, supra,* having validated West Penn's conclusion that the most appropriate forum for obtaining relief on its claims was before the Board, West Penn filed a Petition for Rehearing *En Banc* with the Court of Appeals for the Third Circuit. West Penn requested that the Court issue a stay of federal enforcement so

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Appeals; there had been no showing in *Union Electric* that the Petition for Review was petitioner's sole opportunity to raise its claims of technological and economic infeasibility; and, this Honorable Court in *Union Electric* did not grant certiorari on the due process issue. West Penn specifically indicated that, in contrast to the background of the Union Electric case, the instant case did involve a clear deprivation of West Penn's right to a meaningful hearing which, because of Respondent's improper enforcement action, was no longer available before the Board. Furthermore, this issue was timely raised before the Court of Appeals.

9. West Penn would respectfully direct this Honorable Court's attention to the recent case of *Friends of the Earth v. Potomac Electric Power Co.,* ..... F. Supp. ....., 9 E.R.C. 1122 (D.D.C. 1976), wherein it was determined that the Clean Air Act does not permit claims of economic and technological infeasibility to be raised as a defense to an action brought to enforce an implementation plan.

that a meaningful state hearing could be obtained, unencumbered by EPA enforcement which would be inconsistent with any Order subsequently issued by the Board.

On September 15, 1976, the Court of Appeals for the Third Circuit denied West Penn's Petition for Rehearing and Stay of Enforcement (Appendix J).

By Order dated September 29, 1976, the Court of Appeals for the Third Circuit stayed issuance of its certified judgment until October 22, 1976, but refused to grant West Penn's request for a stay of enforcement pending review by this Honorable Court (Appendix K).

Since the dismissal by the Court of Appeals of West Penn's Petition for Review, a number of events have occurred which have confirmed West Penn's earlier representations to the United States Court of Appeals for the Third Circuit that the threat of enforcement by the Respondent has operated to deny West Penn due process of law:

> (1) As previously noted, on August 30, 1976, Respondent withdrew the compliance order. The Respondent, however, left in full force and effect its Notice of Violation issued on September 13, 1973, thereby preventing West Penn from obtaining the review in the District Court envisioned by the Court of Appeals and leaving West Penn and its officers in jeopardy of immediate enforcement action;[10]

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10. By withdrawing an 18 month old compliance order for "staleness," but leaving a 37 month old Notice of Violation in "full force and effect," Respondent has effectively placed West Penn and its officers *in terrorem* on a continuing basis without an opportunity for West Penn to present its claims of economic and technological infeasibility to an administrative or judicial body ca-

(2) Respondent has again refused to voluntarily refrain from taking enforcement action pending the outcome of state variance proceedings scheduled to begin before the Board on November 3, 1976;

(3) On August 25, 1976, three years after the filing of West Penn's appeal as of right to the Board from the issuance of the conditional variance and two months before the scheduled hearing before the Board, the DER moved to dismiss West Penn's appeal (Appendix L). The DER has alleged, *inter* alia, that West Penn's claims cannot be raised before the Board and that, if West Penn's claims had any merit, West Penn would have succeeded upon the Petition for Review.[11] In addition, on October 1, 1976, the DER moved to continue indefinitely the November 3, 1976 hearing.

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pable of granting the requisite relief. Moreover, West Penn has thereby been denied an opportunity to present evidence to Respondent on the issue of economic and technological infeasibility as was envisioned by this Honorable Court's decision in *Union Electric v. EPA*.

11. In stating on one hand, that West Penn must present its claims in a Section 307(b) Petition for Review, and on the other hand claiming that the dismissal of West Penn's Petition for Review constituted federal judicial approval of the Pennsylvania implementation plan, the DER has completely discounted or ignored this Court's decision in *Union Electric v. EPA, supra*. The DER also fails to grasp the fact that West Penn has never been able to obtain a hearing on the merits before the Court of Appeals or in any other forum. For these and other reasons, West Penn is vigorously opposing the Motion to Dismiss.

REASONS FOR GRANTING THE WRIT

1. Review Of The Decision Below Is Urgently Needed In Order That West Penn Not Be Deprived Of Its Fundamental Constitutional Right To A Meaningful Hearing Upon The Issues Raised In The Petition For Review, Which Due Process Issue Was Not Resolved By This Honorable Court's Decision In *Union Electric Co. v. EPA*.

This Honorable Court in *Union Electric Co. v. EPA*, 44 U.S.L.W. 5060 (U.S. June 25, 1976), determined that a Court of Appeals reviewing an approved state implementation plan in the context of a Section 307(b) Petition for Review cannot set that plan aside on the basis that compliance with such plan is economically or technologically infeasible. This holding was premised upon this Honorable Court's determination that the primary forum for raising claims of economic and technological infeasibility is before the state administrative agency charged with granting variances from the provisions of state implementation plans. In *Union Electric, supra*, this Honorable Court referred to the Pennsylvania Administrative Agency Law of 1945, 71 P.S. §1710.41 (1962),[12] as an example of a provision for judicial resolution of such questions by state courts.

In pursuing its application for variance, West Penn was acting in accordance with revision procedures specifically referred to by this Honorable Court in *Union Electric Co. v. EPA, supra*. Thus, in October, 1973, West

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12. 71 P.S. §1710.41 (1962), has been suspended in part and repealed in part by the Pennsylvania Rules of Appellate Procedure, Rule 5105(c), (d), effective July 1, 1976, and by the Pennsylvania Appellate Court Jurisdiction Act of 1970, July 31, P.L. 673, No. 223, 17 P.S. §211.508(a)(71).

Penn filed a Notice of Appeal to the Board challenging the terms of the conditional variance granted by the DER in September, 1973, and also challenging the necessity for and the validity of the DER's sulfur oxide regulation as applied to Mitchell. The Respondent interjected himself into the state variance proceeding by issuing a Notice of Violation and compliance order in clear contravention of the Pennsylvania implementation plan's provision that the filing of the Amended Petition for Variance constituted a stay of prosecution pending the outcome of the appeal.

From that point forward, such interference by Respondent is believed by West Penn to have caused a delay of more than three years in scheduling a hearing upon West Penn's appeal before the Board. In addition, the Notice of Violation (currently outstanding) and subsequent Compliance Order (recently withdrawn), have raised and continue to raise the spectre of federal enforcement inconsistent with any order issued by the Board as a result of hearings finally scheduled for November 3, 1976, thereby threatening to foreclose any resolution by the Board of the issues raised by West Penn.

Any argument that West Penn's apprehensions in this regard are "speculative" ignores the undisputed fact that, for reasons known only to the Board, after Respondent's issuance of the Notice of Violation, three years elapsed before a hearing was scheduled. Neither is it unreasonable to conclude that the Respondent will resume its enforcement, given Respondent's refusal to join West Penn and DER in a settlement of the state appeal, Respondent's consistent unwillingness to voluntarily stay enforcement pending the outcome of Board proceedings, and the recent withdrawal of the February, 1975 compliance order, which withdrawal order expressly provides that the Notice of Violation "remains in full force and effect."

West Penn respectfully submits that it is entitled to relief from the Respondent's improper issuance of the Notice of Violation since the risk of penalties under the Clean Air Act are *per se so* coercive as to constitute a denial of due process. *Floersheim v. Engman,* 494 F.2d 949 (D.C. Cir. 1973); *Duquesne Light Co. v. EPA I,* 481 F.2d 1 (3d Cir. 1973).[13] At the very least, such relief should take the form of a stay of enforcement pending a conclusive resolution of West Penn's appeal by the Board or the Courts of the Commonwealth of Pennsylvania. However, since the Respondent has indicated by his actions that he is unwilling to permit Pennsylvania process to govern this case, it is doubtful that state hearings, if held, will conclude the issues raised by West Penn, including the need for a revision to the Pennsylvania implementation plan as it relates to sulfur oxide emission standards at Mitchell. For this reason, a hear-

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13. The United States Court of Appeals for the Third Circuit wrote in pertinent part as follows:

> "The basic problem presented by the *Getty Oil* dilemma and the legislative hearing request is that the petitioning companies are liable to sanctions before they have had an opportunity either to complete their state administrative and judicial remedies or to be heard at the federal level. The Court finds that to expose the companies to the risk of punishment without affording them full occasion to express their objections to the state implementation plan is fundamentally unfair."

481 F.2d at p. 10.

We also note that in response to Respondent's withdrawn February, 1975 compliance order, West Penn has filed an application with the Pennsylvania Public Utility Commission to close Mitchell.

ing in a federal forum upon West Penn's Petition for Review may be the only effective means of satisfying due process without doing violence to the guiding principles announced in *Union Electric Co. v. EPA, supra,* and *Train v. NRDC, Inc.,* 421 U.S. 60 (1975).

The decision of the Court of Appeals denying the Petition for Review and refusing to issue a stay of enforcement has caused a continuing threat of inconsistent dual enforcement by the EPA and DER, thereby eliminating the possibility of West Penn's obtaining a meaningful hearing on its claims of economic and technological infeasibility in either state or federal forums. Refusal by the Court of Appeals to grant West Penn's request for stay of enforcement is particularly harsh in view of this Honorable Court's observation in *Union Electric* that:

> "A variance approved as a revision of a plan under §110(a)(3)(A) will be honored by the EPA as part of an applicable implementation plan, §110(d) . . . "

44 U.S.L.W. 5066 at footnote 15.

This principle was the keystone of this Honorable Court's decision in *Union Electric*. It is obvious from the previously cited circumstances that, unless restrained by this Honorable Court, the Respondent intends to continue to threaten federal enforcement throughout the pendency of proceedings before the Board. It is also apparent that the Respondent will continue to arbitrarily disapprove as a revision to the Pennsylvania implementation plan, any variance which does not conform to his preconceived requirements. This is notwithstanding the fact that the Respondent has published a notice in the Federal Register that there were no violations of ambient air quality standards during 1975 in the air basin in which Mitchell is located,[14] and also despite the fact that West Penn has repeatedly presented to the Respondent competent scientific evidence demonstrating that the requested variance will not interfere with the attainment or maintenance of ambient air quality standards.

West Penn respectfully submits that the decision of this Honorable Court in *Union Electric Co. v. EPA, supra,* clearly did not address the due process issue which is central to the case at bar. In this regard, this Court stated in *Union Electric* as follows:

> "Petitioner has briefed its contention that the Due Process Clause of the Fifth Amendment demands that at some time it be afforded the opportunity to raise before a court claims of economic and technological impossibility. This claim was neither presented to, nor considered by, the Court Appeals, and we declined to grant certiorari on the question. 423 U.S. 821 (1975). In any case, we could not resolve petitioner's claim here, for there has been no showing that a § 307(b)(1) appeal would be the only opportunity for petitioner to raise before a court its claims of economic and technological impossibility."

44 U.S.L.W. at 5066, fn. 19.

Unlike the circumstances in *Union Electric Co.,* in the instant case West Penn has presented in detail its claims of denial of due process to the Court of Appeals below. Moreover, the history of this case as

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14. See Federal Register of July 13, 1976, at page 28828, reproduced in Appendix M at p. 129a.

it has been described, *supra,* demonstrates that invalid enforcement actions by the Respondent have not only caused an unjustifiably long delay in the scheduling of a hearing before the Board but, moreover, continuing enforcement and the threat thereof has insured that any hearings which may be held before the Board will be a hollow exercise which can only result in conflicting state and federal enforcement.

West Penn is clearly entitled to an opportunity for a meaningful hearing appropriate to the nature of this case. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Armstrong v. Manzo,* 380 U.S. 545 (1965). Pursuant to this Honorable Court's decision in *Union Electric Co. v. EPA,* revisions to state implementation plans are ordinarily to be accomplished by the Board. However, if the Respondent is permitted to continue to disregard provisions of the Pennsylvania implementation plan, there will be real doubt as to whether the Board will be able to freely exercise this function. Even if a state hearing is held before the Board, it will be meaningless since the Respondent may demand West Penn's obedience to a federal compliance order. Therefore, it is entirely appropriate and not inconsistent with the principles announced in *Union Electric,* that West Penn be permitted under the circumstances to litigate its claims in the Court of Appeals in the context of the Petition for Review. This is especially proper since the District Court may no longer be an available forum to consider West Penn's claims of economic and technological infeasibility as a result of the Respondent's withdrawal of the February, 1975 compliance order.[15]

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15. The Court of Appeals below indicated that West Penn could raise its claims in a District Court action challenging Respondent's issuance of the February, 1975 compliance order. This view appears to have been rejected in the case of *Friends of the Earth v. Potomac Electric Power Co.,* ..... F. Supp. ....., 9 E.R.C. 1122 (D.D.C. 1976)—further evidence of the confusion as to how due process shall be satisfied under the instant circumstances in the wake of *Union Electric Co. v. EPA, supra.*

In summary, West Penn believes that this Honorable Court, in its recent decision in *Union Electric Co. v. EPA, supra,* did not, given the circumstances attendant upon this case, preclude consideration of claims of technological or economic infeasibility of compliance with a state implementation plan in the context of a Section 307(b) Petition for Review, since a meaningful hearing is obviously unavailable from state authorities as a result of invalid enforcement measures by the Respondent. In the circumstances, West Penn believes that due process can only be satisfied by an Order of this Court:

> (1) permitting West Penn to present its claims to the United States Court of Appeals for the Third Circuit[16] and staying any further enforcement by the Respondent pending a disposition of the Petition for Review; or,
>
> (2) if state variance proceedings now scheduled to begin on November 3, 1976 are finally held, staying any further enforcement by the Respondent in deference to a final resolution of West Penn's claims by the Board.

16. West Penn believes that if the Court of Appeals adopts West Penn's position and invalidates the federally-approved sulfur oxide regulation, the Respondent would, on that basis, be required to approve a revision to the Pennsylvania implementation plan reflecting that determination.

2. Review Of The Decision Below Is Necessary In Order That This Honorable Court Clarify Confusion Regarding Federal-State Administration And Enforcement Of The Clean Air Act.

The questions presented by this case involve important issues in a developing area of the law involving the unique federal-state relationship created by the Clean Air Act.

In the case of *Train v. NRDC, Inc.*, 421 U.S. 60 (1975), this Court addressed the question of whether state environmental regulations providing for variances from emission limitations were valid because they constituted postponements of a state implementation plan which the Respondent had approved. This case presents an important corollary, i.e., whether the Respondent may ignore valid variance provisions of a state implementation plan by taking enforcement action which conflicts with provisions of the implementation plan and thereby prevent persons subject to the plan's emission limitations from obtaining relief specifically prescribed by the approved plan. West Penn believes that unless this Court determines that a variance, valid under the test espoused by this Court in *Train v. NRDC, Inc., supra,* is a defense to an enforcement action by the Respondent, then the Respondent will not be constrained from indiscriminately issuing notices of violation, even to those who are in compliance with a state implementation plan, with or without the benefit of a variance.

West Penn finds itself in a dilemma. However, West Penn's dilemma, as noted by the Court of Appeals in its Opinion at Docket No. 74-2050, is unlike the dilemma presented in *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert denied* 409 U.S. 1125 (1973),

quoted approvingly by this Court in *Train v. NRDC, Inc., supra,* because it is not a result of West Penn's attempt to circumvent a state implementation plan. To the contrary, West Penn has in all respects attempted to comply with the Pennsylvania implementation plan. If the Respondent's action in this matter is permitted to go unchecked, it will have the effect of undermining state implementation plans and frustrating Congress' intent to give the states primary authority in the field of air pollution control. *Train v. NRDC, Inc., supra.*

As noted, the Respondent has at every possible opportunity sought to block West Penn's efforts to resolve this matter in state forums as provided by the Clean Air Act, the Pennsylvania implementation plan and this Honorable Court's decision in *Union Electric.* First, Respondent issued a Notice of Violation and subsequently a compliance order in contravention of the Pennsylvania implementation plan. Second, Respondent refused to approve a tentative agreement between West Penn and the DER which would have resolved West Penn's variance appeal. Third, Respondent, having blocked a negotiated settlement, then refused to voluntarily withhold its enforcement power during the pendency of imminent variance hearings, which stay of enforcement is expressly provided for in the Pennsylvania implementation plan as approved by the Respondent.

In the recent case of *Fry v. United States,* 421 U.S. 542 (1975), this Honorable Court stated that:

> ". . . Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

421 U.S. at 547, footnote 7.

It follows that neither can an administrative body to which Congress has delegated functions exercise its authority in contravention of this principle. *District of Columbia v. Train,* 521 F.2d 971, 992-94 (D.C. Cir. 1975), *cert. granted* 44 U.S.L.W. 3685 (U.S. June 1, 1976).

This Honorable Court's holding in *Train v. NRDC, Inc.,* 421 U.S. 60 (1975), established a companion principle when it noted that Congress, in passing the Clean Air Act, had explicitly preserved the principle that,

> "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."

421 U.S. at 64. See also, 42 U.S.C. §1857c-2(a).

The Court further concluded that the discretion left to the states included the continuing authority to revise choices about the mix of emission limitations which may be utilized to achieve and maintain national ambient air quality standards. Any other interpretation of the states' authority would have completely changed the character of a state's role from a voluntary participant as a co-sovereign to that of merely an impotent appendage to the United States Environmental Protection Agency. While this Honorable Court avoided such a result in interpreting the Clean Air Act in *Union Electric Co. v. EPA,* in the instant case the Respondent has acted in a manner designed to frustrate Pennsylvania's role as a sovereign entity.

The makers of our Constitution chose to rely on a *federal* system of government, and on a *balance* of power, to guarantee both efficiency and liberty. The Pennsylvania legislature has delegated to the Board its authority to determine the mix of emission limitations

which are appropriate for Pennsylvania. If the Respondent is not restrained from exercising or threatening to exercise enforcement powers which serve to emasculate variance proceedings scheduled before the Board, Respondent will have succeeded in arrogating unconstitutionally broad powers which will undercut the intended role of the Commonwealth of Pennsylvania in implementing the Clean Air Act.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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